

based on:

1. Ambiguity precluding a “meeting of the minds”;¹⁴
2. Mistake justifying equitable relief;¹⁵
3. Failure to detrimentally rely upon the sub-bid;¹⁶ and
4. Constructive rejection of the sub-bid by post-negotiation of materially different terms.¹⁷

II. CONSTRUCTION CONTRACT FORMATION PROCESS

§ 2:13 Generally

The construction contract formation process is controlled by the owner’s decisions regarding its desired: (1) project delivery method, (2) process for source selection, and (3) type of contract, and extent of risk-sharing between the parties. The traditional formation processes are competitive negotiation¹ and competitive bidding.² Public sector owners typically are restricted by statute as to which contract formation process may be utilized and what terms must be included in contracts. Mandated terms dictated by statute or regulation having the force and effect of law may preclude nonresponsive material exceptions being taken by par-

¹⁴See *GEM Indus., Inc. v. Sun Trust Bank*, 700 F. Supp. 2d 915 (N.D. Ohio 2010) (refusing to enforce an alleged agreement under promissory or equitable estoppel principles, where no evidence was submitted regarding the essential terms of the contract upon which the parties reasonably could have relied); *Camosy, Inc. v. River Steel, Inc.*, 253 Ill. App. 3d 670, 191 Ill. Dec. 706, 624 N.E.2d 894 (2d Dist. 1993) (rejecting application of promissory estoppel because steel erection was “too ambiguous to have been relied upon”).

¹⁵See *B.D. Holt Co. v. OCE, Inc.*, 971 S.W.2d 618 (Tex. App. San Antonio 1998) (holding that the doctrine of promissory estoppel does not bar a supplier of electrical generators from withdrawing a sub-bid containing a \$100,000 typographical error). See § 2:131.

¹⁶See *Rushlight Automatic Sprinkler Co. v. City of Portland*, 189 Or. 194, 219 P.2d 732 (1950) (holding purported reliance on sub-bid was not justified because “it was too good to be true”).

¹⁷See *Hawkins Const. Co. v. Reiman Corp.*, 245 Neb. 131, 511 N.W.2d 113 (1994) (precluding application of the doctrine of promissory estoppel to bar withdrawal of a sub-bid after the bidder submitted a contract form to the sub-bidder with additional material terms not addressed in the sub-bid, such as a “no damage for delay” clause); *R.P. Carbone Constr. Co. v. N. Coast Concrete, Inc.*, 88 Ohio App. 3d 505, 624 N.E.2d 326 (8th Dist. Cuyahoga County 1993) (holding that post-bid negotiations precluded the bidder from holding the subcontractor to its original sub-bid).

[Section 2:13]

¹See §§ 2:175 et seq.

²See §§ 2:20, 2:32 et seq.

ties with whom public sector agencies may contract. In short, public sector contracting there is less bargaining in formation at the prime contract level than in other areas of commerce, and most bargaining on public projects occurs at the subcontractor and supplier levels.

The private sector has much more flexibility. Private owners and contractors use both competitive negotiation and competitive sealed bidding in selecting sources and in contract formation.

While both public and private sectors rely heavily upon the use of standard contract forms³ developed in the 20th century, few construction contracts are deemed to be unenforceable “contracts of adhesion.”⁴ Instead, they are construed in “context,” subject always to the parties’ implied obligations of good faith and fair dealing and the reasoned perspective of unconscionability, and to judicial resort to implied conditions and exceptions to assure basic fairness.⁵

§ 2:14 Project delivery methods—Generally

“Project delivery”¹ refers to the organizational “packaging” of talents and resources required for satisfactory completion of the overall project.² The principal elements of any project include design, construction, finance, operation, maintenance, and overall risk management.³ How these elements are “packaged” has a significant effect upon price, quality, time of completion, and allocation of risks.⁴

On private work, an owner can “package” project delivery in any manner it wishes. On public work, however, where emphasis must be given to the citizens’ equal rights to compete and to the procurement of the work at reasonable cost, source selection by competitive sealed bidding typically has been mandated by statute, and such statutory mandates until recently have proscribed

³See §§ 5:1 et seq.

⁴See Leff, *Contract as Thing*, 19 Am. U.L. Rev. 131, 143 (1970) (describing the formation of a contract of adhesion as “not one of haggle or cooperative process but rather of a fly and flypaper”).

⁵See §§ 6:1 et seq.

[Section 2:14]

¹See §§ 6:1 et seq.

²See §§ 6:2 to 6:18.

³See §§ 6:1, 6:19, 6:20.

⁴See §§ 6:20 to 6:22.